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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BOARD OF TRUSTEES OF THE SHEET
METAL WORKERS' PENSION PLAN OF
SOUTHERN CALIFORNIA, ARIZONA AND
NEVADA; BOARD OF TRUSTEES OF THE
SHEET METAL WORKERS' HEALTH PLAN
OF SOUTHERN CALIFORNIA, ARIZONA AND
NEVADA; BOARD OF TRUSTEES OF THE
SOUTHERN CALIFORNIA SHEET METAL
JOINT APPRENTICESHIP AND TRAINING
COMMITTEE; BOARD OF TRUSTEES OF THE
SHEET METAL WORKERS' LOCAL 105
RETIREE HEALTH PLAN; BOARD OF
TRUSTEES OF THE SOUTHERN CALIFORNIA
SHEET METAL WORKERS' 401(A) PLAN;
SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION OF SHEET METAL AIR, RAIL
AND TRANSPORTATION WORKERS LOCAL
UNION 105 DUES CHECK OFF AND
DEFERRED SAVINGS FUND; BOARD OF
TRUSTEES OF THE SOUTHERN CALIFORNIA
SHEET METAL INDUSTRY LABOR
MANAGEMENT COOPERATION TRUST; AND
SHEET METAL AND AIR CONDITIONING
CONTRACTORS NATIONAL ASSOCIATION
OF SOUTHERN CALIFORNIA,

Plaintiffs,

v.

SIX SIGMA H V A C SERVICES; ROBERT
CARLOS ZARAGOZA; individual,

Defendants.

Case No. 2:17-cv-4744

Hon.

COMPLAINT FOR INJUNCTIVE
RELIEF AND DAMAGES FOR
BREACH OF COLLECTIVE
BARGAINING AGREEMENT;
BREACH OF TRUST
AGREEMENTS; MISUSE OR
MISAPPROPRIATION OF
EMPLOYEE BENEFIT PLAN
ASSETS; AND MULTIPLE
VIOLATIONS OF THE EMPLOYEE
RETIREMENT INCOME
SECURITY ACT OF 1974 (ERISA)

1 Plaintiffs Board of Trustees of the Sheet Metal Workers' Pension Plan of Southern
 2 California, Arizona and Nevada ("Pension Plan"); Board of Trustees of the Sheet Metal
 3 Workers' Health Plan of Southern California, Arizona and Nevada ("Health Plan"); Board
 4 of Trustees of the Southern California Sheet Metal Joint Apprenticeship and Training
 5 Committee ("JATC"); Board of Trustees of the Sheet Metal Workers' Local 105 Retiree
 6 Health Plan ("Retirees Plan"); Board of Trustees of the Southern California Sheet Metal
 7 Workers' 401(a) Plan ("401(a) Plan"); Sheet Metal Workers' International Association of
 8 Sheet Metal Air, Rail and Transportation Workers Local Union No. 105 Union Dues
 9 Check-Off and Deferred Savings Fund ("Dues and Savings Fund"); Board of Trustees of
 10 the Southern California Labor Management Cooperation Trust ("LMCT"); and Board of
 11 Trustees of the Sheet Metal and Air Conditioning Contractors National Association of
 12 Southern California ("Industry Fund") (collectively the "Plans" or "Trust Funds"), aver
 13 as follows:

14 **JURISDICTION**

15 1. Jurisdiction in this Court is based on the exclusive jurisdiction of the District
 16 Courts to hear civil actions brought by a fiduciary pursuant to Sections 502(a)(3) and 515
 17 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"),
 18 29 U.S.C. §§ 1132(a)(3) and 1145, to redress violations or enforce the terms of ERISA or
 19 a multiemployer plan governed by Section 502(e) of ERISA, 29 U.S.C. § 1132(e). Such
 20 jurisdiction exists without respect to the amount in controversy or the citizenship of the
 21 parties, as provided in Section 502(f) of ERISA, 29 U.S.C. § 1132(f).

22 2. Jurisdiction is also based on the jurisdiction of the District Courts to hear
 23 suits for violations of contracts between an employer and a labor organization, without
 24 regard to the amount in controversy or the citizenship of the parties, as provided in Section
 25 301(a) of the Labor Management Relations Act, 1947, as amended ("LMRA"), 29 U.S.C.
 26 § 185(a).

27 3. Venue is proper in this District Court pursuant to Section 502(e)(2) of
 28 ERISA, 29 U.S.C. § 1132(e)(2), and Section 301(a) of the LMRA, 29 U.S.C. § 185(a), in

1 that this is the district in which certain of the Plans are administered, the signatory local
2 unions maintain their offices, and the acts mentioned below took place.

3 **PARTIES**

4 **Plaintiffs**

5 4. With the exception of the JATC, Dues and Savings Fund, LMCT and
6 Industry Fund, at all times mentioned in this complaint, the Plans have been jointly
7 trustee, labor-management trust funds created and maintained pursuant to Section
8 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). At all times mentioned in this complaint,
9 the JATC has been a pooled trust fund created and maintained pursuant to Section
10 302(c)(7) of the LMRA, 29 U.S.C. § 186(c)(7). At all times mentioned in this complaint,
11 the Dues and Savings Fund have been a pooled trust fund created and maintained pursuant
12 to Section 302(c)(4) of the LMRA, 29 U.S.C. § 186(c)(4). At all times mentioned in this
13 complaint, the LMCT and Industry Fund have been an employer-trustee trust fund
14 established pursuant to Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C.
15 § 501(c)(6).

16 5. The Pension Plan and 401(a) Plan are "employee pension benefit plans" and
17 "multiemployer plans" as defined in Section 3(2)(A) and 3(37) of ERISA, 29 U.S.C.
18 § 1002(2)(A) and (37)(A). The Health Plan, JATC and Retirees Fund are "employee
19 welfare benefit plans" and "multiemployer plans" as defined in Section 3(1) and 3(37) of
20 ERISA, 29 U.S.C. § 1002(1) and (37)(A).

21 6. The Plans were created pursuant to separate agreements and declarations of
22 trust ("Trust Agreements") executed and maintained pursuant to collective bargaining
23 agreements between various employer associations and individual contractors located in
24 the Southern California, Arizona and Nevada areas performing work in the sheet metal
25 industry, an industry affecting commerce, and various local unions of the International
26 Association of Sheet Metal Air, Rail and Transportation Workers Local Union No. 105.
27 As described more fully below, the Plans are funded by contributions from employers who
28 are signatory to the Collective Bargaining Agreement.

1 12. Specifically, the Plans are informed and believe and on the basis of such
2 information and belief aver, that the Individual Defendant acted on behalf of and in the
3 interest of the Company in all aspects of labor relations and in its dealings and relations
4 with the Plans, including but not limited to determining which employees the Company
5 would report to the Plans, the number of hours upon which contributions would be reported
6 as owing, and the amount of owed contributions that would be paid. The Individual
7 Defendant authorized and made payments of employee benefit plan contributions from the
8 Company to the Plans.

9 13. The Plans are informed and believe, and on the basis of such information and
10 belief, aver, that the Individual Defendant is the alter egos of the Company based upon the
11 following factors: the Individual Defendant has failed to show proper respect to the
12 separate identity of the Company by failing to observe strict corporate formalities;
13 siphoning funds from the Company and treating corporate assets as their own; the
14 Individual Defendant has demonstrated fraudulent intent with respect to the Company
15 either at the time of its formation, by, among other things, failing to adequately capitalize
16 the Company, or, subsequent to its formation, by abusing its corporate form; the purposes
17 of ERISA and the LMRA will be frustrated if the fiction of the separateness between the
18 Company and the Individual Defendant are recognized and perpetuated; and (iv)
19 recognition of the corporate entity would result in substantial injustice to the Trust Funds
20 because, without employer contributions, the Trust Funds will be inadequately funded, and
21 will be unable to meet their obligations to participating employees who have contributed
22 to the Trust Funds over the years.

23 14. The Individual Defendant is "employer" or agent of an employer engaged in
24 "commerce" and in an "industry or activity affecting commerce" as defined in Section
25 501(1) and (3) of the LMRA, 29 U.S.C. § 142(1) and (3), and within the meaning of
26 Section 301(a) of the LMRA, 29 U.S.C. § 185(a), or the agents acting in the interest of
27 such an employer as defined in Section 501(3) of the LMRA, 29 U.S.C. § 142(3). The
28 Individual Defendant is also "employer" within the meaning of Section 3(5) of ERISA,

29 U.S.C. § 1002(5) and is thus "obligated to make contributions to a multiemployer plan" within the meaning of 9 U.S.C. § 1145.

15. The Plans are informed and believe, and on the basis of such information and belief aver, that at all relevant times the Individual Defendant has been the qualifying individual for state licensing and bond purposes, and the responsible managing officer for the Company.

16. The Individual Defendant is the partner, joint venturer, employer, employee, actual and ostensible agent, and representative of same and, in doing the acts alleged, is acting on behalf of such partnership and joint venture, and within the course and scope, and the apparent course and scope, of such employment, agency, and representation and on behalf of such partnership and joint venture.

THE OBLIGATION TO CONTRIBUTE

17. The Company entered into, executed and at all material times, has been party to a written collective bargaining agreement (the "Bargaining Agreement") with International Association of Sheet Metal Air, Rail and Transportation Workers Local Union No. 105. The Bargaining Agreement establishes and renews the Trust Agreements. The Plans have at all times been third party beneficiaries of the Bargaining Agreement.

18. Under the Bargaining Agreement and Trust Agreements, an employer's monthly contributions to the Pension Plan, Health Plan, JATC, Retirees Fund, 401(a) Plan, Dues and Savings Fund, LMCT and Industry Fund are separately calculated by determining the total number of hours worked by the employer's employees in the reporting month, and multiplying these total hours by the prescribed hourly contribution rates set forth in the Bargaining Agreement. Additionally, beginning August 1, 1990, under the Bargaining Agreement and Trust Agreements, the employers make additional contributions to the 401(a) Plan, both as based on an hourly contribution rate specified in the Bargaining Agreement and from deductions from employee wages pursuant to, and in amounts specified in, wage deduction agreements signed by the employers' employees.

1 19. The Bargaining Agreement and Trust Agreements obligate an employer to
2 file monthly remittance reports with the Plans and to pay the Plans the contributions set
3 forth in such reports by the tenth day of the month following the month in which such
4 contributions were earned by the employees' labor. The Bargaining Agreement and the
5 Trust Agreements provide that contributions are delinquent if not paid by the twentieth day
6 of such latter month. The Company and the Individual Defendant are fully aware of the
7 obligation to timely pay contributions.

8 20. Because contributing employers themselves calculate and prepare the
9 monthly reports, the Plans must rely upon the honesty of employers and their accuracy in
10 reporting the hours worked and contributions owed on behalf of their covered employees.
11 To verify the accuracy of the reports, the Plans have at all times maintained and employer
12 audit program pursuant to the Trust Agreements. As a part of this audit program, the Plans'
13 auditors periodically audit the books and payroll records of contributing employers. If an
14 audit reveals that an employer owes contributions to the Plans in excess of the amounts
15 contained in the monthly remittance reports submitted to the Plans, the Plans assess an
16 hourly audit fee, together with other assessments described herein.

17 21. The Bargaining Agreement and Trust Agreements provide that if an
18 employer fails to furnish remittance reports on a timely basis, it shall pay the Fund \$200
19 per plan or ten percent of the delinquent contributions, whichever is greater, as a late filing
20 assessment. In addition, the Bargaining Agreement and Trust Agreements provide that if
21 contributions to the Plans are delinquent, the employer will pay liquidated damages in the
22 amounts of ten percent of the delinquent amount for the first month, and five percent of the
23 delinquent amount for each month thereafter in which the contributions remain delinquent.

24 22. The Bargaining Agreement and the Trust Agreements provide that an
25 employer will be liable to the Plans for any costs incurred in, or relating to, the collection
26 of any contributions, liquidated damages or late filing assessments due to the Plans,
27 including interest and attorney's fees.
28

1 23. The Bargaining Agreement and Trust Agreements provide that in the event
2 an employer is delinquent in the payment of contributions or liquidated damages to the
3 Plans for a period of fifteen days or more, then such employer shall, upon written notice,
4 be required to furnish to the Plans or their representative all records and other information
5 deemed necessary by the Plans to enable them to file mechanic's liens, stop notices or
6 Miller Act claims on behalf of the affected employees pursuant to applicable state law, in
7 order to collect unpaid compensation owing by the employer. The required information
8 includes identification of each project for which the employer supplied labor or materials,
9 and the number of hours worked by the employer's employees at each job during the
10 months in which the employer was delinquent. The Trust Agreements further provide that
11 the Plans may require the employer to submit this information to the Plans or their
12 representative on a weekly basis while the employer remains delinquent. The Trust
13 Agreements also acknowledge that the parties recognize that time is of the essence in the
14 filing of the mechanic's liens, stop notices or Miller Act claims and that the employer shall
15 therefore supply such information immediately upon request by the Plans. The Bargaining
16 Agreement further provides that any failure to provide such information by the Individual
17 Defendant subjects the officers, directors and shareholders to individual liability.

18 24. The Trust Funds have a collection policy in which it states that unpaid
19 contributions are vested assets of the Trust Fund on the day they become due or delinquent.
20

21 **THE EMPLOYER'S DELINQUENCIES**

22 25. The Company has failed and refused to remit contributions to the Plans for
23 the work months of December 2016, January 2017, and February 2017 and through the
24 present and continuing through the date of this Complaint in an amount which is presently
25 unknown to the Plans, but which the Plans will establish by proof and at present is in excess
26 of \$15,766.64.

27 26. The Company owes liquidated damages for the late payment or nonpayment
28 of contributions for the work months of December 2016, January 2017, and February 2017

1 and through the present and continuing through the date of this Complaint in an amount
2 which is presently unknown to the Plans, but which the Plans will establish by proof and
3 at present is in excess of \$3,153.33.

4 27. The Bargaining Agreement provides for interest to be paid on all delinquent
5 contributions, calculated at the rate of twelve percent (12%) per annum.

6 28. The Company owes interest for the late payment or nonpayment of
7 contributions through the present and continuing through the date of this Complaint in an
8 amount which is presently unknown to the Plans, but which the Plans will establish by
9 proof and at present is in excess of \$1,576.66.

10 29. The Company was timely notified by letter of these delinquencies and it was
11 assessed liquidated damages, and payment of the delinquent contributions and liquidated
12 damages was repeatedly demanded. These letters also demanded mechanic's lien, stop
13 notice and Miller Act claim information. To date, the Company has failed and refused to
14 pay the contributions and other sums owing to the Plans and has refused to furnish
15 mechanic's lien, stop notice and Miller Act claim information.

16 30. The Company is fully aware of the obligation to make contributions on
17 behalf of covered work performed by the Company's employees and the obligation to
18 submit accurate remittance reports, as set forth herein, and is equally aware of its failure to
19 make such contributions.

20
21 **FIRST CAUSE OF ACTION:**

22 **AGAINST DEFENDANTS FOR INJUNCTIVE RELIEF AND DAMAGES**

23 **FOR BREACH OF BARGAINING AGREEMENT**

24 31. Plaintiffs repeat and reallege each and every allegation contained in
25 paragraphs 1 through 30 above as if they were repeated here in full.

26 32. Defendants' failure to pay such contributions and other sums and to submit
27 mechanic's lien, stop notice and Miller Act claim information to the Plans on the dates on
28 which such contributions and other sums were due are violations of the Bargaining

1 Agreement. As a direct result, Defendants have become indebted to the Plans for
2 contributions and other sums, and will become indebted to the Plans for additional
3 contributions and other sums, in an amount which is presently unknown to the Plans, but
4 which the Plans will establish by proof and at present is in excess of \$20,496.63.

5 33. As a direct result of Defendants' failure to furnish mechanic's lien, stop
6 notice and Miller Act information to the Plans, the Plans have been damaged in an amount
7 which is presently unknown to the Plans, but which the Plans will establish by proof and
8 at present is in excess of \$20,496.63.

9 34. The Plans are informed and believe, and based upon such information and
10 belief aver, that additional delinquencies have occurred both before and after the date of
11 this complaint, and that such delinquencies are continuing. As a direct result, Defendants
12 have become and will become indebted to the Plans for additional contributions and other
13 sums in an amount which is presently unknown to the Plans, but which the Plans will
14 establish by proof and at present is in excess of \$20,496.63.

15 35. The Plans are informed and believe, and based upon such information and
16 belief aver, that Defendants have threatened not to pay, and will refuse or fail to pay, future
17 contributions to the Plans, and that it will thereby create future unpaid delinquencies during
18 the remaining term of the Bargaining Agreement. Unless Defendants are enjoined from
19 failing to make such contributions, furnishing such remittance reports and providing such
20 mechanic's lien, stop notice and Miller Act claim information, as described above, the Plans
21 will suffer irreparable injury for which there is no adequate remedy at law since, among
22 other things, the brief period of time in which mechanic's liens, stop notices and Miller Act
23 claims must be recorded or filed will expire, and additionally, the Plans will be required to
24 bring a multiplicity of actions at law to recover such delinquencies as they occur, to the
25 Plans' great expense and hardship. On that basis, the Plans seek injunctive relief requiring
26 Defendants to timely pay contributions, and to timely furnish remittance reports and
27 mechanic's lien, stop notice and Miller Act claim information for construction projects.

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SECOND CAUSE OF ACTION:
AGAINST DEFENDANTS FOR INJUNCTIVE RELIEF
AND DAMAGES FOR BREACH OF TRUST AGREEMENTS

36. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 35 above as if they were repeated here in full.

37. Defendants' failure to pay such contributions and other sums and to submit mechanic's lien, stop notice and Miller Act claim information to the Plans on the dates on which such contributions and other sums were due are violations of the Trust Agreements. As a direct result, Defendants have become indebted to the Plans for contributions and other sums, and will become indebted to the Plans for additional contributions and other sums, in an amount which is presently unknown to the Plans, but which the Plans will establish by proof and at present is in excess of \$20,496.63.

38. As a direct result of Defendants' failure to furnish mechanic's lien, stop notice and Miller Act information to the Plans, the Plans have been damaged in an amount which is presently unknown to the Plans, but which the Plans will establish by proof and at present is in excess of \$20,496.63.

39. The Plans are informed and believe, and based upon such information and belief aver, that additional delinquencies have occurred both before and after the date of this complaint, and that such delinquencies are continuing. As a direct result, Defendants have become and will become indebted to the Plans for additional contributions and other sums in an amount which is presently unknown to the Plans, but which the Plans will establish by proof and at present is in excess of \$20,496.63.

40. The Plans are informed and believe, and based upon such information and belief aver, that Defendants have threatened not to pay, and will refuse or fail to pay, future contributions to the Plans, and that it will thereby create future unpaid delinquencies during the remaining term of the Bargaining Agreement. Unless Defendants are enjoined from failing to make such contributions, furnishing such remittance reports and providing such mechanic's lien, stop notice and Miller Act claim information, as described above, the Plans

1 will suffer irreparable injury for which there is no adequate remedy at law since, among
 2 other things, the brief period of time in which mechanic's liens, stop notices and Miller Act
 3 claims must be recorded or filed will expire, and additionally, the Plans will be required to
 4 bring a multiplicity of actions at law to recover such delinquencies as they occur, to the
 5 Plans' great expense and hardship. On that basis, the Plans seek injunctive relief requiring
 6 Defendants to timely pay contributions, and to timely furnish remittance reports and
 7 mechanic's lien, stop notice and Miller Act claim information for construction projects.

8
 9 **THIRD CAUSE OF ACTION:**
 10 **AGAINST ALL DEFENDANTS FOR INJUNCTIVE RELIEF AND DAMAGES**
 11 **FOR VIOLATION OF ERISA**

12 41. Plaintiffs repeat and reallege each and every allegation contained in
 13 paragraphs 1 through 40 above as if they were repeated here in full.

14 42. By engaging in the acts described above, Defendants have violated the terms
 15 of the Plans, and thereby have violated certain provisions of ERISA including Section 515,
 16 29 U.S.C. § 1145. As a direct result, Defendants have become indebted to the Plans for
 17 contributions and other sums, and will become indebted to the Plans for additional
 18 contributions and other sums, in an amount which is presently unknown to the Plans, but
 19 which the Plans will establish by proof and at present is in excess of \$20,496.63.

20 43. The Plans are informed and believe, and based upon such information and
 21 belief aver, that Defendants have threatened not to pay, and will refuse or fail to pay, future
 22 contributions to the Plans, and that it will thereby create future unpaid delinquencies during
 23 the remaining term of the Bargaining Agreement. Unless the Defendants are enjoined from
 24 failing to make such contributions, furnishing such remittance reports and providing such
 25 mechanic's lien, stop notice and Miller Act claim information, as described above, the Plans
 26 will suffer irreparable injury for which there is no adequate remedy at law since, among
 27 other things, the brief period of time in which mechanic's liens, stop notices and Miller Act
 28 claims must be recorded or filed will expire, and additionally, the Plans will be required to

bring a multiplicity of actions at law to recover such delinquencies as they occur, to the Plans' great expense and hardship. On that basis, the Plans seek injunctive relief requiring Defendants to timely pay contributions, and to timely furnish remittance reports and mechanic's lien, stop notice and Miller Act claim information for construction projects.

44. Because Defendants acted with malice, oppression and conscious disregard of the rights of the Plans, the Plans are entitled to an award of punitive damages as an appropriate legal remedy available under Section 502(g)(2)(E) of ERISA, 29 U.S.C. § 1132(g)(2)(E), in an amount deemed appropriate by the Court.

FOURTH CAUSE OF ACTION:
DAMAGES FOR MISUSE OR MISAPPROPRIATION
OF ASSETS OF EMPLOYEE BENEFIT PLANS

45. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 44 above as if set forth in full.

46. The Plans are employee benefit plans within the meaning of 18 U.S.C. § 664, in that they are subject to many of the provisions of Title I of ERISA (29 U.S.C. §§ 1001-1168).

47. The delinquent employee benefit plan contributions referenced herein which were and are due and owing to the Plans are assets of the Plans within the meaning of Subtitle A (29 U.S.C. §§ 1001-1003) and Parts 1 (29 U.S.C. §§ 1021-1031) and 4 (29 U.S.C. §§ 1101-1114) of Subtitle B of Title I of ERISA, and 18 U.S.C. § 664.

48. The Defendants were and are directly responsible for, and caused, the Company's failures to pay to the Plans the delinquent employee benefit plan contributions referenced herein, in violation of 18 U.S.C. § 664.

49. Plaintiffs are entitled to damages for the Individual Defendant's violations of 18 U.S.C. § 664.

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FIFTH CAUSE OF ACTION:
DAMAGES FOR BREACH OF FIDUCIARY
DUTIES IN VIOLATION OF ERISA

50. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 49 above as if set forth in full.

51. At all times material herein the Individual Defendant were the fiduciary with respect to the Plans within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or control respecting management or disposition of assets of the Plans.

52. By engaging in the acts and omissions to act described herein, the Individual Defendant breached their fiduciary duties with respect to the Plans within the meaning of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A).

53. Pursuant to Section 409 of ERISA, 29 U.S.C. § 1109, the Individual Defendant are personally liable to make good to the Plans any losses to them resulting from each such breach of his fiduciary duties, and to restore to the Plans any profits which have been made through the Individual Defendant's use of assets of the Plans, an amount presently estimated to be in excess of \$20,496.63, and which will be established by Plaintiffs at trial.

54. The Plans request that they be awarded their costs of action and reasonable attorney's fees pursuant to Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

SIXTH CAUSE OF ACTION:
DAMAGES FOR WRONGFUL DIVERSION OF ASSETS OF
EMPLOYEE BENEFIT PLANS IN VIOLATION OF ERISA

55. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 54 above as if set forth in full.

56. By engaging in the acts and omissions to act described herein, the Individual Defendant caused assets of the Plans to inure to the benefit of an employer, namely the

Company, and/or the Individual Defendant themselves, and to not be held for the exclusive purposes of providing benefits to participants in the Plans and their beneficiaries and defraying reasonable expenses of administering the Plans, in violation of Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1).

57. Pursuant to Section 409 of ERISA, 29 U.S.C. § 1109, the Individual Defendant are personally liable to make good to the Plans any losses to them resulting from the above-referenced wrongful diversion of assets of the Plans, and to restore to the Plans any profits which have been made through the Individual Defendant's use of assets of the Plans, in an amount which is presently unknown to the Plans, but which the Plans will establish by proof and at present is in excess of \$20,496.63.

58. The Plans request that they be awarded their costs of action and reasonable attorney's fees pursuant to Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

SEVENTH CAUSE OF ACTION:
DAMAGES FOR PROHIBITED TRANSACTIONS
IN VIOLATION OF ERISA

59. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 58 above as if set forth in full.

60. By engaging in the acts and omissions to act described herein, the Individual Defendant dealt with assets of the Plans in his own interests or for his own accounts, in violation of Section 406(b)(1) of ERISA, 29 U.S.C. § 1106(b)(1).

61. Pursuant to Section 409 of ERISA, 29 U.S.C. § 1109, the Individual Defendant are personally liable to make good to the Plans any losses to them resulting from the above-referenced prohibited transactions, and to restore to the Plans any profits which have been made through the Individual Defendant's use of assets of the Plans, in an amount which is presently unknown to the Plans, but which the Plans will establish by proof and at present is in excess of \$20,496.63.

62. The Plans request that they be awarded their costs of action and reasonable attorney's fees pursuant to Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

EIGHTH CAUSE OF ACTION:

DAMAGES FOR ALTER EGO VIOLATIONS

ESTABLISHING LIABILITY FOR INDIVIDUAL DEFENDANT

63. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 62 above as if set forth in full.

64. The Individual Defendant is the alter ego of the Company based upon the following factors: the Individual Defendant has failed to show proper respect to the separate identity of the Company by failing to observe strict corporate formalities; siphoning funds from the Company and treating corporate assets as his own; the Individual Defendant has demonstrated fraudulent intent with respect to the Company either at the time of its formation, by, among other things, failing to adequately capitalize the Company, or, subsequent to its formation, by abusing its corporate form; the purposes of ERISA and the LMRA will be frustrated if the fiction of the separateness between the Company and the Individual Defendant are recognized and perpetuated; and (iv) recognition of the corporate entity would result in substantial injustice to the Trust Funds because, without employer contributions, the Trust Funds will be inadequately funded, and will be unable to meet their obligations to participating employees who have contributed to the Trust Funds over the years.

65. At all times material herein, the Individual Defendant is the partner, joint venturer, employer, employee, actual and ostensible agent, and representative of same and, in doing the acts alleged, is acting on behalf of such partnership and joint venture, and within the course and scope, and the apparent course and scope, of such employment, agency, and representations and on behalf of such partnerships and joint ventures.

66. Pursuant to the above alter ego violations, the Individual Defendant cannot take advantage of the corporate form and is, therefore, personally liable for all

1 amounts owed to the Plans pursuant to Section 502(g)(2) of ERISA, 29 U.S.C.
2 § 1132(g)(2).

3
4 **PLAINTIFFS THEREFORE PRAY JUDGMENT AGAINST DEFENDANTS**
5 **AS FOLLOWS:**

6 As to Causes of Action 1, 2, 3 and 8 Only:

7 That the Court restrain and enjoin Defendants, for so long as they remain
8 contractually and legally bound to make payments of contributions to the Plans,
9 from failing or refusing:

10 (1) to make payments of contributions to the Plans on the dates on which they fall
11 due;

12 (2) to submit to the Plans any remittance reports required from contributing
13 employers on the dates on which they fall due; and

14 (3) to submit to the Plans any and all information deemed necessary by the Plans
15 to enable Defendants' employees or his representative(s) to file mechanic's liens, stop
16 notices and Miller Act claims.

17 (4) For payment of delinquent contributions, audit fees and costs from Defendants
18 for all months that Defendants are delinquent at the time of trial, in an amount which is
19 presently unknown to the Plans, but which the Plans will establish by proof at the time of
20 trial and at present is in excess of \$15,766.64.

21 (5) For payment of liquidated damages from Defendants at the time of trial, an
22 amount presently unknown to the Plans, but which will established by the Plans at the time
23 of trial is in excess of \$3,153.33.

24 (6) For reasonable attorney's fees and costs of suit from Defendants.

25 (7) For prejudgment interest pursuant to Section 502(g)(2) of ERISA, 29 U.S.C.
26 § 1132(g)(2), and post-judgment interest in accordance with the Bargaining Agreement,
27 the Trust Agreements and law, an amount presently estimated to be in an amount presently
28

1 unknown to the Plans, but which will established by the Plans at the time of trial is in excess
2 of \$1,576.66.

3 As to Causes of Action 3 and 8 Only:

4 (1) For payment of punitive damages from the Defendants in an amount deemed
5 appropriate by this Court.

6 As to Causes of Action 4, 5, 6, and 7 Only:

7 (1) For payment from the Individual Defendant of actual damages presently
8 estimated to be in excess of \$20,496.63.

9 (2) For prejudgment and post-judgment interest in accordance with applicable
10 law; an amount presently estimated to be in an amount presently unknown to the Plans, but
11 which will established by the Plans at the time of trial.

12 As to Causes of Action 4, 5, 6, and 7 Only:

13 (1) For an order directing the Individual Defendant to account for and pay over
14 to the Plans all profits which have been made through his use of assets of the Plans,
15 pursuant to Section 409 of ERISA, 29 U.S.C. § 1109.

16 (2) For reasonable attorney's fees and costs of suit from Individual Defendant,
17 pursuant to Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

18 As to All Causes of Action:

19 (1) For such other and further relief as to this Court may seem just and proper.

20 Dated: June 27, 2017

21 Respectfully submitted,

22 **GILBERT & SACKMAN**
23 A Law Corporation

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25 By: /s/Laurie Traktman
26 Laurie A. Traktman
27 Attorneys for Plaintiffs
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